UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

IN RE:	)	**Case No. 00-31770**
	)	**Chapter 7**
DONNA N. McALLISTER,	)	
	)	
Debtor.	)	

ORDER DENYING DEBTOR'S MOTION FOR SANCTIONS

This matter is before the Court upon Debtor Donna McAllister's ("McAllister" or "Debtor") Motion for Sanctions for Violation of the automatic stay provision of 11 U.S.C. 362 filed May 8, 2001, and the Response of Nationwide Mortgage Corporation ("FNMC") dated May 21, 2001. A hearing was held on June 14, 2001. The facts are not disputed.

FINDINGS OF FACT

1. On August 15, 2000, McAllister filed a Chapter 7 case in this District. Her bankruptcy filing triggered the automatic stay provisions of 11 U.S.C. § 362(a), thereby enjoining collection efforts against McAllister or her property.

2. In her petition, McAllister listed a secured debt of $86,388.72 owed to FNMC, representing the mortgage on her home. In her Statement of Intentions, McAllister indicated that she would surrender the home.

3. FNMC got notice of McAllister's case through the Notice of the Chapter 7 Case, Meeting of Creditors, and Deadlines. This Notice was mailed to FNMC on August 16, 2000.

4. Reflecting its awareness of McAllister's bankruptcy, FNMC filed a Request for Notice on October 2, 2000.

5. Nevertheless, on or about October 6, 2000, McAllister received an FNMC billing statement in the mail (dated September 18, 2000). Her attorney immediately wrote FNMC and warned that this was a violation of the automatic stay. The dunning ceased.

6. On November 29, 2000, the Debtor received her discharge. Legally, the automatic stay was replaced by the Section 524 discharge injunction.

7. In the meantime, McAllister's bankruptcy trustee decided not to attempt to sell her residence, which had been vacated by the Debtor after the filing.

8. On February 12, 2001, FNMC filed a Motion seeking Relief From Stay seeking to foreclose on the residence. Consistent with the Debtor's intention to surrender the property, the motion was not opposed. An Order granting relief from stay to FNMC was entered on April 16, 2001.

9. Three days later, FNMC sent the Debtor a three-page letter advising McAllister that her loan was in default; telling her how to cure the arrearage; and describing the possible consequences of her failure to do so. McAllister was warned that failure to pay may result in "additional costs and legal fees, continued notification to the credit bureau regarding [her] delinquency, and possible loss of [her] home through foreclosure

proceedings." Later, the letter reiterates the effect of nonpayment on her credit: "a negative credit report reflecting on your credit record may be submitted to a credit reporting agency if you fail to fulfill the terms of your credit obligations." The letter references an enclosed pamphlet entitled,"How to Avoid Foreclosure." This pamphlet was not placed in evidence.

10. The Debtor responded to the letter with this Motion. McAllister contends that FNMC's earlier October letter violated the automatic stay, and that the April 19 letter violated the discharge injunction. She demands compensatory damages, punitive damages, and her attorney's fees. She also requests injunctive relief prohibiting FNMC from future violations of Section 524.

CONCLUSIONS OF LAW

A. ***FNMC's First Dunning Notice of October 6, 2000 was Not A Wilful Violation of the Automatic Stay, Accompanied by Actual Damages, so as to Justify a Recovery.***

Under Section 362(a), practically all collection efforts against a debtor on account of a prepetition debt violate the automatic stay. However, there are violations and there are violations.

Stay violations fall into two basic groups, technical and wilful. Technical violations are mistakes, inadvertent collections efforts, often caused by automated billing processes. Even if a creditor has received prior notice of the bankruptcy, a debtor is

not entitled to recover from the creditor for an inadvertent stay violation. In re Hamrick, 175 B.R. 890 (W.D.N.C. 1994).

Wilful violations are different. These violations result from intentional creditor action. Some bill collectors simply refuse to follow the law and won't take "no" as an answer. They are aware of, but choose to violate, the automatic stay.

A debtor's shield against a wilful stay violation is Section 362(h), which provides:

> An individual injured by any wilful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages.

Obviously, the Code treats the two types of violations differently. Inadvertent violations are not actionable; wilful violations are, but only if they have caused the Debtor damages.

This last requirement is often overlooked. Over a long period of time, a practice has arisen in this District wherein many debtors' attorneys treat all wilful violations of the stay as actionable with, or without, the presence of damages to the debtor. Most of these never make it to court, as the cost to the creditor of defending these actions is greater than the amount for which such claims can be settled. The undersigned believes that this interpretation stretches Section 362(h) further than either Congress or the higher Courts intend that it reach.

This point was clearly made in In re Hamrick, 175 B.R. 890 (W.D.N.C. 1994). In that case, the Hamrick's filed a Chapter 13

case and creditor Defense Finance was given notice of the Debtor's Chapter 13 case. Afterward, the Debtors received one or more payment demands from the creditor. Debtors' counsel responded to the demand(s) with a warning letter. The Creditor withdrew the payment demands, and no motion for sanctions was filed.

Later, and as the result of a notice sent by the Trustee to this creditor, another written demand for payment was issued. Although this second dun caused no real harm to them other than annoyance, the Hamricks moved for sanctions under Section 362(h).

The Bankruptcy Court found this to be a wilful violation of the stay and imposed monetary sanctions against the creditor. However, on appeal the U.S. District Court, Judge Voorhees presiding reversed that decision.

In holding that this was not a wilful violation which justified sanctions, Judge Voorhees pointed out two misunderstandings in the lower court's ruling as to the nature and extent of Section 362(h).

This decision corrected two misapprehensions about Section 362(h). First, Hamrick overruled the notion that once a creditor gets a bankruptcy notice that any future stay violation is wilful no matter when it occurs. Instead, Hamrick holds that a stay violation is only "wilful," when "[t]here is ample evidence in the record to support the conclusion that [the creditor] knew of the pending petition and intentionally attempted to [continue

collection procedures] in spite of it." Id. at 892, citing Budget Service Co. v. Better Homes of Virginia, Inc., 804 F.2d 289, 292-93(4th Cir. 1986). In short, the conduct must be "intentional or deliberate."[1] Id.

Second, Hamrick, reminds us that even a wilful stay violation is not actionable, unless the debtor has been injured. By the clear wording of Section 362(h), a recovery from the offending creditor is authorized only when the stay violation is both (1) wilful and (2) the debtor is injured as a result. Id. at 893.

Factually, Hamrick and the present case are almost identical. As such, it is clear that the first notice received by McAllister shortly after she filed bankruptcy should not result in a recovery against FNMC. There is no suggestion in this record that this was a wilful violation. Clearly, there was no injury caused to the debtor.

B. *Likewise, FNMC's Letter of April 19, 2001 if a Violation of the Discharge Injunction, was a Noninjurious Technical violation Not Warranting a Finding of Contempt*.

For similar reasons, the second notice should not result in sanctions either.

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[1] Consistent with this, shortly before Hamrick was decided, the Fourth Circuit held that to commit a "willful act" in violation of the automatic stay, a creditor need not act with specific intent but must only commit an intentional act with knowledge of automatic stay. In re Strumpf, 37 F.3d 155 (4th Cir. 1994).

When McAllister received her discharge, the automatic stay was supplanted by the Section 524 Discharge Injunction. That Section provides, in relevant part:

(a) A discharge in a case under this title—

> (2) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor.... 11 U.S.C. 524(a)(2).

Unlike Section 362(h), there is no damages' clause in Section 524. Despite this, it is well-settled that an injured debtor may recover for injuries caused by a violation of the discharge injunction: "[A] bankruptcy court may take remedial measures to enforce these provisions and vindicate the rights of a discharged debtor in the event a creditor ignores these essential protections afforded to debtors. In re Thomas, 184 B.R. 237, 240 (Bankr. M.D.N.C. 1995); See also In re Miller, 81 B.R. 669, 672 (Bankr.M.D.Fla. 1988).

The authority for such a recovery lies in Code Section 105: "[T]he court may issue any order, process or judgment that is necessary or appropriate to carry out the provisions of the Bankruptcy Code." 11 U.S.C. 105. Section 105 has been interpreted in this Circuit to give Bankruptcy Judges contempt powers. In re Walters, 868 F.2d 665 (4th Cir.1989).

Since the bankruptcy discharge is an injunction, violation of that provision would be contempt. A civil contempt analysis is

therefore appropriate in reviewing the propriety of the second letter.

Civil contempt requires a finding of: (1) the existence of a valid decree of which the alleged contemnor had actual or constructive knowledge; (2) ... that the decree was in the movant's "favor"; (3) ... that the alleged contemnor by its conduct violated the terms of the decree, and had knowledge (at least constructive knowledge) of such violations; and (4) ... that [the] movant suffered harm as a result. Ashcraft v. Conoco, 218 F.3d 288 (4th Cir. 2000).

In the current case, one can argue whether FNMC's second letter was a violation of the discharge injunction. Certainly, having both an in rem property interest to foreclose and relief from stay by which to do so, FNMC was entitled to follow applicable federal and state foreclosure procedures to effect this end. Moreover, to the extent that it does not violate other applicable debtor-creditor laws,[2] a mortgage lender should be able to negotiate with a discharged debtor to afford him an opportunity to retain his home. Because most debtors' residences are fully encumbered by the time bankruptcy ensues, usually the property is not treated by the Chapter 7 trustee. This leaves it to the debtor

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[2] McAllister argues FNMC should have contacted her bankruptcy attorney, not her directly. This raises an interesting question of when a debtor ceases to be represented by counsel, a question that no doubt varies from one judicial district to another. As it is not necessary to this decision, no determination is made of this question.

and creditor's election whether the property is foreclosed or a deal is struck to keep the debtor in it. Not surprisingly, many of these arrangements are arrived at after the discharge is entered and the bankruptcy case is closed.

On the other hand, if any type of demand is permitted postdischarge when an in rem lien is present, unscrupulous lenders would use this to subvert the discharge and to collect the discharged debt as an in personam liability.

In this case, most of FNMC's notice appears directed toward the default, cure and foreclosure on the residence. These provisions probably do not violate the discharge injunction because they pertain to the nondischarged in rem interest. However, the parts of the letter threaten that failure to pay the sums owed will result in further adverse credit reporting. A creditor may, of course, report an unpaid debt to the credit reporting agencies without violating the discharge injunction. However, when one threatens to do so unless he is paid money, this suggests an unlawful, in personam collection effort.

However, these points need not be determined. As a contempt matter, recovery may be had only if the debtor has been damaged. As with the first letter, the record in this case reflects no damage to the debtor whatsoever, other than hurt feelings and the attorney's fees incurred in seeking sanctions. Neither of these

are compensable in this case. In re Haan, 93 B.R. 439 (Bankr. W.D.N.C. 1988).[3]

This is in keeping with the purposes of the stay and the discharge injunction. These legislative injunctions were designed to be shields to protect debtors from inappropriate creditors' behavior. They were definitely not meant to be swords. Or as another North Carolina bankruptcy court has held, bankruptcy is not designed to be a "spring-loaded trap gun for creditors. In re Clayton, 235 B.R. 801 (Bankr. M.D.N.C. 1998).

In the absence of damages, the motion for contempt must also fail.

Finally, since the Code already enjoins in personam collection of a discharged debt, there is no need to issue a supplemental injunction restraining FNMC from future violations of Section 524.

The Debtor's motion is **DENIED.**

SO ORDERED.

J. Craig Whitley
United States Bankruptcy Judge

[3] One can imagine some circumstances whether this general rule would not pertain. For example, a creditor who continues the collection attempts, time and again, after being warned of the injunction, would be subject to sanctions. This is not such a case, however.